

BRIEF IN SUPPORT OF THE FOREGOING PETITION.

POINT I.

The decision below is in conflict with the principle laid down by this Court that the police power may be exercised only in harmony with constitutional principles.

This Court has refrained from defining with "circumstantial precision" the limitations imposed upon the states in the exercise of their police powers. (*Eubank v. Richmond*, 226 U. S. 137, 142 (1912).) That the police power is broad cannot be denied. This Court has repeatedly held, however, that the exercise of the power may not infringe upon rights guaranteed by the Constitution. "But necessarily it [the police power] has its limits and must stop when it encounters the prohibitions of the Constitution." *Eubank v. Richmond*, *supra*, at p. 142.

To the same effect, see *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540 (1902), where at page 558 the Court said:

"But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the states to the contrary notwithstanding, a statute of a state even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived."

Buchanan v. Warley, 245 U. S. 60, 74 (1917), *Shevlin-Carpenter Co. v. Minnesota*, 218 U. S. 57, 69, 70 (1912), and *Lochner v. New York*, 198 U. S. 45, 56 (1905), are additional authorities for this proposition.

POINT II.

Decisions of this Court have protected obligations of contract against impairment by subsequent legislation. The decision below is in conflict.

Pursuant to the provisions of Chapter 676, Laws of New York of 1892, railroad corporations were given the authority from time to time to borrow money, issue bonds and to mortgage their property and franchises to secure the payment of such sums. The Debtor executed its Refunding Mortgage on June 1, 1892, and its General Mortgage on May 31, 1905. These mortgages were liens upon all the Debtor's property. Subsequently and in 1926, the legislature enacted Chapter 233 of the Laws of 1926 (superseded by Chapter 678 of the Laws of 1928), which recited that the amount expended by the State in grade crossing elimination shall be certified, apportioned, assessed and levied against the railroad and that "Any amount so levied shall thereupon become and be a first and paramount lien upon all real property of such railroad corporation * * *." [Laws of 1928, Chapter 678, §4(3)] At the date of enactment of the Grade Crossing Elimination Act, the liens of the Debtor's Refunding and General Mortgages constituted contractual obligations protected by Article I, Section 10, of the Federal Constitution against impairment by subsequent legislation.

In *Trustees of the Wabash and Erie Canal Co. v. Beers*, 67 U. S. 448 (1862), this Court held that the holder of bonds,

the issuance of which was authorized under a state statute, had a security for his debt which was protected by the provision in the United States Constitution which forbids a state to pass any law impairing the obligation of contracts. Speaking through Mr. Justice Miller, the Court said at page 452 that:

“* * * the Legislature of Indiana (whatever it may have designed to do) could not divest that lien or postpone it to others, because it was the result of contract and was protected by the provision of the Constitution of the United States against impairing the obligation of contracts.”

In *Toledo, Delphos and Burlington Railroad Co. v. Hamilton*, 134 U. S. 296 (1890), this Court reiterated the principle that a state legislature is without power to subordinate liens acquired prior to enactment of a statute. Speaking with reference to a mechanic's lien under the Ohio law, the Court said, at page 301:

“* * * There was no statute in force at the time the mortgage was executed, giving any priority to subsequent mechanics' liens, and by the mortgage the mortgagee took its vested priority, beyond the power of the mortgagor or the legislature thereafter to disturb.”

In *Savings Society v. Multnomah County*, 169 U. S. 421 (1897), on page 428, this Court stated:

“This court has always held that a mortgage of real estate, made in good faith by a debtor to secure a private debt, is a conveyance of such an interest in the land, as will defeat the priority given to the United States by act of Congress in the distribution of the debtor's estate. *United States v. Hooe*, 3 Cranch, 73; *Thelusson v. Smith*, 2 Wheat. 396, 426; *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 441.”

See, also, *W. B. Worthen Co. v. Thomas*, 292 U. S. 426, (1934), where this Court held void under the contract clause of the Constitution an Arkansas statute exempting from judicial process the proceeds of life insurance policies because the Arkansas courts had construed the statute as divesting a garnishment lien previously acquired.

POINT III.

Procedural due process demands that notice and an opportunity to be heard be given before the State can deprive a person of his property.

This Court has held that the interest of a mortgagee in the protection of his security against impairment is a valuable property right safeguarded by our Federal Constitution. (*Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555 (1935)). The holding of the Circuit Court of Appeals that the Grade Crossing Elimination Act itself was notice to the mortgagees is not sustainable on the authority of this Court's decision in *Anderson National Bank v. Lockett*, 321 U. S. 233, 243 (1944), and such notice, therefore, was not in fact legal notice either to the Mortgage Trustees herein or to the bondholders. The statute under consideration in the *Anderson* case did contain a provision for notice to bank depositors and the question was presented as to the sufficiency of the method designated for giving notice. The vice of the Grade Crossing Elimination Act consists in its failure to provide for any notice whatever to mortgagees. In this respect it violates the test laid down by this Court in the *Anderson* case (*supra*) at page 246, that: "The fundamental requirement of due process is an opportunity to be heard upon such notice and

proceedings as are adequate to safeguard the right for which the constitutional protection is invoked."

Nor can the vice be cured by notice to the railroad as intimated in the opinion below. The duty of the Mortgage Trustees to protect the security of the mortgages on behalf of the bondholders is a non-delegable fiduciary duty and one which the Mortgage Trustees did not in fact, nor by reasonable implication entrust to the mortgagor railroad.

The notice by publication was not prescribed by the statute and was not competent to bind the Mortgage Trustees since actual notice was necessary. *Burck v. Taylor*, 152 U. S. 634, 654 (1894).

POINT IV.

Substantive due process under the Fourteenth Amendment prohibits the taking by a State of private property for public use without just compensation.

The Court has held that the due process clauses of the Fifth and Fourteenth Amendments safeguard private property against a taking by the nation or a state respectively for public use without just compensation. *West, et al. v. Chesapeake and Potomac Telephone Co. of Baltimore*, 295 U. S. 662 (1935).

It has also held that the right of a mortgagee to have the mortgaged premises applied exclusively to the satisfaction of his mortgage debt was a substantive property right of which the mortgagee could not constitutionally be deprived without compensation, by an Act of Congress relating to pre-existing mortgages. *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555 (1935).

It is submitted that the decision of the Circuit Court of Appeals by granting priority to the State's lien over the

Debtor's pre-existing mortgage liens deprives the mortgagees of their rights to have the mortgaged property devoted exclusively to the satisfaction of the mortgage debt. Since the Grade Crossing Elimination Act provides no compensation to mortgagees for such taking, it is unconstitutional and the failure of the Circuit Court so to hold renders its decision in conflict with the decisions of this Court.

Conclusion.

The writ of certiorari should be granted as prayed.

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Respectfully submitted,

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